Nos. S168047, S168066, S168078

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Karen L. Strauss, *et al.*, *Petitioners*,

v.

Mark B. Horton, as State Registrar of Vital Statistics, etc., *et al.*, *Respondents*;
Dennis Hollingsworth, *et al.*, *Interveners.*

Robin Tyler, *et al.*, *Petitioners*,

v.

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APPLICATION OF FAITH IN AMERICA, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FAITH IN AMERICA, INC. IN SUPPORT OF PETITIONERS

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 8.200(c) of the California Rules of Court, Faith in America, Inc. ("FIA") respectfully requests leave of this Court to file the attached brief Amicus Curiae in support of the Petitioners in this proceeding, and in support of this application shows:

1. FIA is a non-profit organization founded in 2005 by Mitchell Gold, who grew up as a closeted gay son of Jewish parents in a middle-class neighborhood of Trenton, New Jersey and became a successful entrepreneur, and Jimmy Creech, a straight man and former minister tried and defrocked by the United Methodist Church in 1999 for performing a same-sex wedding ceremony. Mr. Gold is the co-editor of the recently-published *Crisis: 40 Stories Revealing the Personal, Social, and Religious Pain and Trauma of Growing up Gay in America* (Greenleaf Book Group Press 2008) and the author of one of those stories. Mr. Creech is the author of an essay in the book entitled "Homosexuality Is Not A Sin."

2. FIA believes that the world's great religious traditions emphasize the love of neighbor as well as the love of God, and that compassion, justice, freedom, and respect for the dignity of all people are these religions' most authentic and noble expressions. FIA also believes that in America, lesbian, gay, bisexual and

transgender ("LGBT") persons nonetheless are victims of religious teachings based on misunderstanding and deep-seated prejudice.

3. FIA's mission is to (a) educate Americans about the harm that this deep-seated prejudice and bigotry within majoritarian religious institutions has historically inflicted, and continues to inflict on LGBT Americans, particularly teenagers, and (b) do so without offending the religious consciousness of people of faith who are disturbed by these religious teachings and are open to rejecting them in favor of understanding, knowledge, and compassion, and respect for all people regardless of sexual orientation.

4. FIA's unique mission and perspective in the struggle for same-sex marriage equality led the late Mildred Loving to choose FIA as the organization to which to give a statement of hope and support on the 40th anniversary of the *Loving v. Virginia* decision ((1967) 388 U.S. 1) that ended the ban on marriage between couples of different races. FIA believes that, for the same reasons, its views could be of assistance to this Court, by providing the Court with information and perspectives on an issue that is both at the core of FIA's struggle for LGBT equality and at the heart of the Official Proponents' case: the use of religious rhetoric and inflated claims of "consensus" to justify constitutionally-impermissible discrimination.

5. Accordingly, FIA respectfully seeks leave to file the attached brief so that, in resolving this matter, the Court will have the benefit of the perspectives presented in the brief.

WHEREFORE, FIA respectfully requests leave to file the attached brief Amicus Curiae.

Dated: January 14, 2009

DICKSTEIN SHAPIRO LLP

By: Cassandra S. Franklin
CASSANDRA S. FRANKLIN
Attorney for
Faith in America, Inc.

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INTRODUCTION

The Petitions ask this Court to decide whether the California Constitution allows the narrow majority who supported Proposition 8 to deny the right to marry – a right recognized by this Court as a fundamental, inalienable right under the California Constitution – to a minority group based on a constitutionally-suspect classification – sexual orientation – so as to maintain the status quo and conform the minority to the majority's religious beliefs.

Faith in America, Inc. ("FIA") agrees with Petitioners: whether this Court decides (1) that Proposition 8's denial of an inalienable right to a historically disfavored minority constitutes a far-reaching, qualitative revision to the California Constitution under the guise of an initiative-amendment; or (2) that the California Constitution cannot logically be read to allow the abrogation of such an essential liberty via an initiative-amendment, the Court's conclusion should be the same: "The discriminatory elimination of a fundamental right from a group defined by a suspect classification is not a change to the California Constitution that can be accomplished by a simple majority vote of the people." *See* Reply in Support of Petition for Extraordinary Relief (filed Jan. 5, 2009, in No. S168047) at 4.

FIA writes separately to provide the Court with perspective on an issue that is both at the core of FIA's struggles for lesbian, gay, bisexual

and transgender ("LGBT") equality and at the heart of the official proponents of Proposition 8's ("Official Proponents" or "Interveners") case: the use of religious rhetoric and inflated claims of "consensus" to justify constitutionally-impermissible discrimination.

Interveners admit that Proposition 8 destroys the right to marry for same-sex couples, and that, with its passage, that right "no longer exists" for them. In the next breath, however, Interveners assert that Proposition 8 should give this Court, LGBT people, and religious minorities no cause for concern because Proposition 8 supposedly is not a "case of the majority in any manner tyrannizing a vulnerable majority." Interveners' Response to Pages 75-90 of the Attorney General's Brief (filed Jan. 5, 2009, in Nos. S186047, et al.) ("Inter. Resp. Br.") at 5, 15. Attempting to minimize the impact of an initiative they spent tens of millions of dollars and countless words of alarmist "religious" rhetoric to pass, the Official Proponents would have this Court believe Proposition 8 does nothing more than "restore[] the basic definition of marriage in California to its historic roots." *Id.* at 15. In essence, the Interveners argument is that if "everyone" agrees that "marriage" can only exist between a man and a woman, and this Court in Interveners' estimation improperly disturbed this universal understanding, then surely a majority (however narrow) of Californians can return "marriage" to its traditional, and in their view proper, definition

without harming anyone who falls outside of it, and without taking away rights which, from their perspective, never existed.

Interveners have conspicuously dropped the overtly religious rhetoric and justifications used to support Proposition 22 from their briefs in opposition to the Petition. But their careful wordsmithing cannot erase the fact that Proposition 8 is a religiously motivated initiative, and its goal to confine the definition of civil marriage to that of majoritarian religions.

The Virginia state courts told Mildred Loving only four decades ago that marrying the white man she loved was a crime because God intended the races to be segregated. *Loving v. Commonwealth* (Va. 1966) 147 S.E.2d 78. The Official Proponents ask this Court to make the same mistake here by denying citizens the right to marry the person they love – "something that should [be] so clear and right" (Mildred Loving, *Loving for All* (prepared for delivery on June 12, 2007) at 2, *available at* http://www.freedomtomarry.org/pdfs/mildred_loving-statement.pdf ("Loving Statement")) – based on distortions of religious doctrine. In the name of tradition, they seek to exclude same-sex couples from an institution that Phyllis Lyon, who married her partner of 50 years, Del Martin, in the first ceremony held on February 12, 2004, and again on June 16, 2008 after this Court's decision in *In re Marriage Cases* (2008) 43 Cal. 4th 757, considers "the ultimate rite of love and commitment." *See* Rachel Gordon, *Lesbian Rights Pioneer Del Martin Dies at 87*, San Fran.

Chron., Aug. 28, 2008, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/27/BAGI12JDIS.DTL&tsp=1.

FIA urges the Court to remain as vigilant in guarding against the use of religious and "consensus"-based arguments to mask serious constitutional violations in deciding the issues presented by the Petition, as it was last May in *In re Marriage Cases*, and as it has been at least since its groundbreaking *Perez v. Sharp* (1948) 32 Cal. 2d 711 decision, which outlawed anti-miscegenation statutes under the California Constitution nearly 20 years before the Supreme Court did under the U.S. Constitution in *Loving v. Virginia* (1967) 388 U.S. 1. *See Lawrence v. Texas* (2003) 539 U.S. 558, 571 (condemnation of LGBT people "shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family" has no place in U.S. Constitutional analysis).

ARGUMENT

I. THE RIGHT TO MARRY IS A FUNDAMENTAL RIGHT, GROUNDED IN CIVIL LAW AND PROTECTED BY THE CONSTITUTION.

A. The Right To Marry Is Fundamental.

Marriage implicates the fundamental right to privacy under the California Constitution. *See, e.g., In re Marriage Cases*, 43 Cal. 4th at 809 ("[P]ast California cases establish beyond question that the right to marry is a fundamental right whose protection is guaranteed to all persons by the California Constitution."); *Perez*, 32 Cal. 2d at 714 ("Marriage is thus

something more than a civil contract subject to regulation by the state; it is a fundamental right of free men."); *see also Ortiz v. Los Angeles Police Relief Ass'n* (2002) 98 Cal. App. 4th 1288, 1303 ("[U]nder the state Constitution, the right to marry and the right of intimate association are virtually synonymous. . . . [W]e will refer to the privacy right in this case as the right to marry."); *In re Carrafa* (1978) 77 Cal. App. 3d 788, 791 (The right to marry is a "fundamental" constitutional right.).

For this reason, this Court held in *In re Marriage Cases* that the right to marry "represents the right of an individual to establish a legally recognized family with the person of one's choice" (43 Cal. 4th at 814-15), and that this fundamental right must be guaranteed in California "to *all* individuals and couples, *without regard to their sexual orientation.*" *Id.* at 820 (second emphasis added).

B. The Right To Marry Is A Creature Of Civil Law, Not Religious Belief.

The fact that marriage is both a civil law right and a religious institution has been and remains a principal, if not the sole, driver of the modern battle over same-sex marriages in this State and elsewhere. Most religious denominations have an entire belief system, as well as a substantial canon of religious law, involving marriage, all of which vary greatly from religion to religion.

The Constitution of the State of California protects individuals' right to worship according to their beliefs (including their beliefs about marriage). But the right to "marriage" that is afforded by the Constitution and recognized by the State is not the right to a religious marriage, but only to a secular one recognized by the State.

Although, for some, religious and civil marriage may be so seamless as to appear to be the same creature, the law is only properly concerned with marriage in its *civil* form. *See In re Marriage Cases*, 43 Cal. 4th at 792 n.11 (noting that California's Civil Code prohibits marriages from being invalidated "'for want of conformity to the requirements of any religious sect'" (citation omitted)). Divorce likewise is a creature solely of civil law. Whether the legally-recognized marriage takes place in a temple, a chapel, a synagogue or a mosque, it can only be legally dissolved by a civil court. This distinction ensures that the State establishes no preference for one religious group's definition of marriage. Cal. Const. art. I, § 4; *see also id.* art. IX, § 8 (prohibiting public funding for religious schools and the teaching of religious doctrine in public schools); *id.* art. XVI, § 5 (the State may not do anything to aid religion or to sustain an entity controlled by religion).

Proposition 8 blurs this crucial (and in this case, dispositive) distinction between civil and religious marriage, at the expense of constitutional liberties. It is evident that at least some, if not many, voters

who supported Proposition 8 were profoundly confused as to which definition of "marriage" was at stake: civil marriage – protected by law – or religious marriage – a matter of private conscience. One comment on an article posted on a Roman Catholic news website about Proposition 8 aptly illustrates this confusion:

> Gays can get married – in civil unions – they can't change the teaching of my church by changing the definition of marriage – that's why I will vote against gay marriage – only the religious kind. They can have all the civil unions they want – they can't rewrite a gay version of the Bible. That's all.

See Nov. 2, 2008 12:54 PM EST Comment to *New Poll Shows Prop 8 Supporters Winning in California* (Oct. 22, 2008), *available at* http://www.catholicnewsagency.com/new.php?n=14118.

This commenter evidently cast her vote for her religion's definition of marriage, believing the debate to be over the proper definition of *all* marriage, including marriage defined by her deepest personal convictions, and even in the Bible. An "only the religious kind" of marriage limitation, however, has no rightful place in the law, and certainly no place in the same Constitution that guarantees that no one religion will be promoted over any other, and that no citizen will be forced to be religious, or a member of any religion.

II. THE MOTIVATION BEHIND PROPOSITION 8 IS PRIMARILY RELIGIOUS AND ITS PRINCIPAL GOAL IS THE IMPOSITION OF A MAJORITARIAN RELIGIOUS DEFINITION OF MARRIAGE.

Interveners conspicuously avoid the term "religion" in their briefs, but nowhere do they identify a valid *secular* purpose for forbidding the State to allow same-sex couples to marry as a matter of civil law. These Official Proponents are the same people and religious groups who supported Proposition 8's precursor, Proposition 22 in *In re Marriage Cases*. In that setting, they did not try to paper over the religious purpose and goal of a statutory same-sex marriage ban – to the contrary, they trumpeted them. *See, e.g.*, Brief of the Church of Jesus Christ of Latter-Day Saints, et al., as Amici Curiae Supporting Respondent (filed Sept. 26, 2007, in No. S147999) ("LDS Br.") at 43-44 (stating that religion supposedly sustains "traditional" marriage's "uniquely elevated status," and cautioning this Court that adopting a legal definition of marriage different from that of the majoritarian religions would "fracture the centuries-old consensus about the meaning of marriage" and allegedly lead to social discord). Even though FIA respectfully disagrees with Justice Parrilli's conclusion in his concurring opinion in the Proposition 22 case, FIA believes that he had it exactly right when he observed that the "often unspoken, but underlying, assumption about the current definition of marriage is that it comes from religious tradition," and that "the opposition

to same-sex partnerships comes from biblical language and religious doctrine." *In re Marriage Cases* (2006) 143 Cal. App. 4th 873, 941 (Parrilli, J., concurring).

The Interveners have surgically removed from their briefs here the overtly religious rhetoric and rationales in those they filed in the Proposition 22 case, but their underlying religious motivation and goal remains unchanged. All that has changed is the tactic that the Official Proponents now employ to reach the same goal. Religion is still the basis of Proposition 8, and the words "traditional" or "historical" still code for "religious." For example, Interveners' official Proposition 8 website has a section devoted to resources for churches. They include a special flyer designed for church posting, which states that "God himself is the author of marriage. Its meaning is written in the very nature of man and woman as they come from the hand of the Creator." *See* http://protectmarriage.com/files/Bulletin_Color.pdf.

These resources also include a flow chart encouraging the use of trained pastors and church communities to spread support for Proposition 8 to the "Undecided Community (Secular)" by imparting "Biblical Truth." *See* http://www.protectmarriageca.com/assets/ProtectMarriageStrategy.pdf. Simply put, Interveners' sudden and conspicuous avoidance of the word "religious" does not alter the fact that religion drove the donations in

support of Proposition 8,[1] and the votes of those who supported Proposition 8 on November 4th,[2] and lies at the very core of this constitutional debate.

Proposition 8's religious foundation runs counter to the most basic guarantee of the California Constitution: "All people" – regardless of their religious, ethnic, or racial background – "are by nature free and independent and have inalienable rights." Cal. Const. art. I, § 1. What is more, advancing this inherently religious view of marriage (and of only *some* religions at that), necessarily – and impermissibly – restricts the religious freedom of individuals whose religions believe in and support same-sex marriage. *See Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-13 (statutes violate the federal Constitution's Establishment Clause if they

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[1] The Los Angeles Times reported that, ten days before the election, supporters of Proposition 8 already had raised $27.5 million, with many donors citing religious beliefs as the reason for their contribution and with 40% of that amount estimated to come from Mormons. The Times article stated that one donor, who could only afford a small contribution, explained her reasoning: "If we don't hold up God's commandments in our country, what kind of country are we going to have?" Dan Morain & Jessica Garrison, *Prop. 8 Foes, Fans Amass $60 Million*, L.A. Times, Oct. 25, 2008, *available at* http://articles.latimes.com/2008/oct/25/local/me-marriagemoney25.

[2] On November 6, 2008, the Los Angeles Times shared the thoughts of one voter who – after struggling between his support for civil rights and his beliefs as a Pentecostal Christian – decided to vote for Proposition 8: "It's straight biblical . . . . It's just not right." Dan Morain & Jessica Garrison, *Backers Focused Prop. 8 Battle Beyond Marriage*, L.A. Times, Nov. 6, 2008, at 3, *available at* http://theenvelope.latimes.com/la-me-gaymarriage6-2008nov06,0,6138400.story?page=1.

(1) do not have a secular purpose, (2) have the primary effect of advancing religion, or (3) foster excessive government entanglement with religion).

III. PROPOSITION 8 IS JUST THE LATEST EXAMPLE OF DISCRIMINATION MASQUERADING AS CONSENSUS.

A. Religion And The Status Quo Have Been Used For Centuries To Support Discrimination That Could Not Otherwise Be Defended Under The Constitution.

To disguise Proposition 8's religious basis, the Official Proponents characterize the initiative as nothing more than "a successful effort to place long-standing *public policy* in the Constitution." Interveners' Opposition Brief (filed Dec. 19, 2008, in No. S168047) ("Inter. Br.") at 39 (emphasis added); *see also* Inter. Resp. Br. at 2 (claiming that Proposition 8 leaves intact legal rights of same-sex couples, and is targeted only at "restor[ing] to California law, after a brief hiatus, the ancient and nearly ubiquitous definition of marriage"). Additionally, in a section of the official Proposition 8 website entitled "Myths and Facts about Proposition 8," Official Proponents dismiss concerns that Proposition 8 will "enshrine[] discrimination in our Constitution" as mere "myth." Why? Because "Proposition 8 does not discriminate against gays; it simply restores the meaning of marriage and protects it as an essential institution that has benefited mankind since the beginning of time."

The Official Proponents once again assume their conclusion – that there is a consensus on this subject – taking it as a given that "[e]very

culture in the world understands that marriage is between a man and a woman," and that "Californians from all walks of life and ethnic backgrounds," even non-religious Californians, feel the same way. *See* http://protectmarriage.com/files/myths.pdf. This empty rhetoric ignores the reality that marriage is not just a social norm or institution; it is a fundamental legal right, and denying that legal right to a protected class is the very essence of discrimination.

In appealing to what they would have this Court assume are shared religious beliefs and general "cultural" sentiment, Interveners ask the Court to join them in shielding the same-sex marriage ban from constitutional protections and scrutiny. They do so by asserting that the preference for opposite-sex marriages is supposedly not only *a* social, historical, and even biological truth, but purportedly the *only* such truth.[3] This is not a new

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[3] *See, e.g.*, Brief of California Ethnic Religious Organizations for Marriage as Amicus Curiae Supporting Appellees (filed Sept. 24, 2007, in No. S147999) at 7 ("The history of marriage demonstrates that non-recognition of same-sex 'marriages' does not stem from a particular religious tradition; it is universal. Even secular and aggressively atheist regimes (like Soviet Russia) have never recognized same-sex 'marriages.'"); Brief of African American Pastors in California as Amici Curiae Supporting Respondents (filed Sept. 25, 2007, in No. S147999) at 3 (claiming that laws restricting marriage to opposite-sex couples are "firmly rooted in the biology that defines human nature and reproduction"); LDS Br. at 3 n.1 (asserting that, while religious viewpoints are properly included in public policy debates, the arguments in the brief purportedly rest on historical and sociological bases).

stratagem. In fact, as detailed below, "consensus" (or claimed consensus) has been employed throughout the history of this country and this State to justify treatment that is later found discriminatory and unconstitutional by this and other courts of last resort.

1. Mildred Loving and the struggle against religious-based bans against interracial marriage.

The late Mildred Loving marked the fortieth anniversary of the Supreme Court's decision in *Loving* with the observation that the religion and tradition grounds used to prevent same-sex couples from marrying are fundamentally no different from those used to prohibit marriage between members of different races. In 1959, a Virginia court sentenced her and her husband to either one year in jail or 25 years in exile outside of Virginia because they were an interracial couple. The trial judge based his decision squarely on the Protestant Bible:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

See Loving v. Virginia (1967) 388 U.S. 1, 3. The Supreme Court of Virginia upheld the trial judge's decision, relying on its prior decision in *Naim v. Naim* (Va. 1955) 87 S.E.2d 749. *Loving v. Commonwealth* (Va. 1966) 147 S.E.2d 78, 82.

In *Naim*, the Supreme Court of Virginia found that Virginia could constitutionally forbid a man of Chinese descent from marrying a white woman. The *Naim* court found no reason to overturn legislation designed to preserve "the racial integrity of its citizens" so that the State would not have a "mongrel breed" of citizens. *Naim*, 87 S.E.2d at 756.

Nor did it find any reason why Virginia "must permit the corruption of blood even though it weaken or destroy the quality of its citizenship." *Id.* To the contrary, "[b]oth sacred and secular history teach that nations and races have better advanced in human progress when they cultivated their own distinctive characteristics and culture and developed their own peculiar genius." *Id.* The United States Supreme Court subsequently reversed the Lovings' conviction, acknowledging that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12.

This Court, of course, had recognized this fundamental right long before the U.S. Supreme Court did. Nearly 20 years earlier, this Court had ruled that marriage was a "fundamental right of free men" that could not be withheld absent a pressing social objective. *Perez*, 32 Cal. 2d at 714. This right, "to join in marriage with the person of one's choice" (*id.* at 715), is the very right for which the Lovings fought, and the very right which Proposition 8 now denies to the countless LGBT Californians whose chosen spouse happens to be of the same gender. Indeed, if this Court

accepts the Official Proponents' retroactivity argument, the 36,000 LGBT Californians who married in the wake of this Court's decision in *In re Marriage Cases* will not only have that right denied, but their marriages nullified as well.

Ms. Loving knew first hand the pain couples suffer when religion dictates who is allowed to marry: "My generation was bitterly divided over something that should have been so clear and right. The majority believed that what the judge said [in *Loving*], that it was God's plan to keep people apart, and that government should discriminate against people in love." Loving Statement at 2.

Ms. Loving's memories of that pain, and of the joy her victory in the Supreme Court brought her in the 40 years that followed, reminded her every day how much it meant to have the freedom to marry "the person precious to me." *Id.* No wonder, then, that she believed that

> all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. Government has no business imposing some people's religious beliefs over others. Especially if it denies people's civil rights.

Id.

Ms. Loving's words echo Phyllis Lyon's upon the August 2008 death of her partner of 50 years, Del Martin, whom she married in the first ceremony held on February 12, 2004, and again on June 16, 2008 after this Court's decision in *In re Marriage Cases*: "Ever since I met Del 55 years

ago, I could never imagine a day would come when she wouldn't be by my side . . . . I also never imagined there would be a day that we would actually be able to get married . . . ." *See* Rachel Gordon, *Lesbian Rights Pioneer Del Martin Dies at 87*, San Fran. Chron., Aug. 28, 2008, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/27/BAGI12JDIS.DTL&tsp=1. Even in her sorrow, Ms. Lyon took comfort in the fact that she and her partner had finally been able to "enjoy the ultimate rite of love and commitment before she passed." *Id.* Ms. Martin did not live to see her marriage threatened by the passage of Proposition 8. If the Official Proponents have their way, however, Ms. Lyon will live to see her marriage erased from the records as if it never took place.

The protections for minorities embedded in the California Constitution must require more than this, if they are to mean anything at all.

2. The danger of substituting the appearance of consensus for constitutional safeguards goes beyond the miscegenation cases.

FIA is familiar with the ways in which "consensus" and religion have been invoked for centuries to justify the discriminatory treatment of disfavored minorities: from slavery to women's suffrage, from school segregation to statutes criminalizing same-sex sodomy. Confederate President Jefferson Davis believed that slavery was normal and moral because it "was established by decree of Almighty God . . . it is sanctioned

in the Bible, in both Testaments, from Genesis to Revelation . . . it has existed in all ages, has been found among the people of the highest civilization, and in nations of the highest proficiency in the arts." *See Jefferson Davis, Constitutionalist: His Letters, Papers and Speeches* 286 (J.J. Little & Ives Company 1923). God assuredly was on the side of men who opposed giving women the right to vote, because suffragists and their supporters were neither "'lovers of God,'" nor "'believers in Christ.'" *See A Simple History Lesson, available at* http://www.faithinamerica.info/pdf/FIA-history-1.pdf (quoting Justin Fulton, a 19th century writer).

Even the judiciary has not been immune to the temptation to assume that something must be right because it is the norm. Lower courts prior to *Brown v. Board of Education* (1954) 347 U.S. 483, for example, justified segregated schools on similar claims of consensus. *See Briggs v. Elliott* (E.D.S.C. 1951) 98 F. Supp. 529, 533-34 ("[T]he coexistence of different races in the same area" has been a problem "[s]ince the beginning of human history."); *Davis v. County Sch. Bd.* (E.D. Va. 1952) 103 F. Supp. 337, 339 ("It indisputably appears from the evidence" that the segregation law did not rest on prejudice, but merely codified "one of the ways of life in Virginia. Separation of white and colored 'children' in the public schools of Virginia has for generations been a part of the mores of her people.").

Even the United States Supreme Court has succumbed to this "normative" fallacy, only to regret it and subsequently have to reverse itself. Thus, in *Bowers v. Hardwick* (1986) 478 U.S. 186, 192, the Court found that the prohibition on private, consensual homosexual sodomy was legitimately grounded in "ancient roots." Justice Burger emphasized this rationale in his concurrence: "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards." *Id.* at 196 (Burger, J., concurring).[4]

In 2003, however, the Supreme Court squarely rejected this reasoning, both as a historical and factual matter, and overruled *Bowers* to

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[4] It warrants at least passing mention in this context that Justice Powell, who had cast the deciding vote in *Bowers*, was asked four years later if he had any second thoughts about that vote. Linda Greenhouse, *Black Robes Don't Make the Justice, but the Rest of the Closet Just Might*, N.Y. Times, Dec. 4, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9507E5DD173BF937A35751C1A9649C8B63&sec=&spon=&pagewanted=all. Justice Powell's answer was that he had taken a second look at the *Bowers* case and had concluded that "I think I probably made a mistake in that one." *Id.* Justice Powell, who was 79 when the case reached the Court, had no personal experience with gay rights and found the issue raised by the case confusing and somewhat threatening. *Id.* Justice Powell told one of his law clerks while the case was pending that "I don't believe I've ever met a homosexual." *Id.* The clerk, who ironically was a closeted gay man, told the Justice: "Certainly you have, but you just don't know that they are." *Id.*

the extent it factored a general condemnation of homosexuality into its constitutional analysis. *Lawrence*, 539 U.S. at 571. The Court recognized that "[f]or many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." *Id.* But the Court firmly rejected the proposition that these concerns were properly considered in determining "whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.* ("'Our obligation is to define the liberty of all, not to mandate our own moral code.'" (quoting *Planned Parenthood of Se. Pa. v. Casey* (1992) 505 U.S. 833, 850)). This Court should reject the Proposition 8 Official Proponents' attempt to use the power of the State to impose their religious views "on the whole society" just as emphatically.

IV. INTERVENERS' CLAIMS OF "CONSENSUS" ARE EITHER MISLEADING OR WRONG.

A. The One-Man-One-Woman Definition Of Marriage Is Not Universal, Even Among Religions.

The hotly contested debate over Proposition 8 and its narrow victory contradict Interveners' claim that Proposition 8 merely "restores marriage to its ancient and nearly ubiquitous definition." The traditional one-man-one-woman theory of marriage does not represent the beliefs of the 48% of voters who voted against Proposition 8. Similarly, if the traditional configuration were as universal as Interveners contend, 18,000 same-sex

couples would not have chosen to marry in the 20-week window opened by this Court's *In re Marriage Cases* decision and shut on election day. Nor would jurisdictions as diverse as Spain, the Netherlands, Belgium, Massachusetts, Canada, Norway, Nepal, and South Africa have recognized same-sex unions as they have done.[5]

Interveners' claim does not hold up even when applied only to religions and religious individuals. Several denominations officially recognize the blessing of same sex marriages, including the Unitarian Universalist Church, the United Church of Canada, and some Quaker and Reform Jewish communities. The brief filed by the Unitarian Universalist Church and others in *In re Marriage Cases* further belies the notion that "virtually all religions and churches" support the ban on same-sex marriage. *See* Brief of the Unitarian Universalist Association of Congregations, et al., as Amici Curiae Supporting Parties Arguing for

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[5] Jeffrey S. Siker, *Homosexuality and Religion: An Encyclopedia* 12 (2007) ("Same-sex marriage became legal in the Netherlands in 2001, in Belgium in 2002, and in Spain in 2005."). Canada's Civil Marriage Act, Statutes of Canada S.C. 2005, c. 33, was placed into law on July 20, 2005. South Africa's Civil Unions Act, No. 17 of 2006, extended legally-recognized marriages to same-sex couples in November of 2006. On November 17, 2008, Nepal's Supreme Court ordered the government to extend equal rights – including the right to marry – to gender minorities. Wendy Zeldin, *Nepal: Human Rights - Supreme Court Orders Drafting of Same-Sex Partnership/Marriage Law,* Law Library of Congress, Global Legal Monitor, Dec. 30, 2008, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_896_text.

Marriage Equality (filed Sept. 26, 2007, in No. S147999). This brief was filed jointly by more than 400 religious organizations representing, among others, Native American, Christian, Unitarian Universalist, Jewish, Hindu, Buddhist, and Muslim faiths, all of which support the right of same-sex couples to marry.

B. Even If Consensus Were As Broad As Interveners Argue It Is, It Would Not Obviate Constitutional Concerns About Proposition 8.

For most of us, marriage is so central to the way that we order our social interactions, to the way that we arrange our legal, personal and spiritual affairs, and to our very lives, that it is tempting to think of it as a constant – something that cannot, never has, and should not change. The fact is, however, that marriage has never been such a constant: marriage has evolved during this country's history; sometimes, we have gotten it wrong; and sometimes, we have even gotten it wrong in the name of "religion," "tradition," "consensus," or whatever word was or is currently in vogue to describe the agreement by the majority that one way of marrying is right (theirs) and that of others (the minority *du jour*) is wrong.

At various times, this reasoning was used to deny slaves the right to civil marriage, to prevent wives from owning property, and to prohibit marriages between members of different races. Opponents of the late nineteenth century Married Women's Property Acts had no doubt that allowing married women to own their own property would destroy the

institution of marriage. One state legislative committee even went so far as to warn that affording wives this fundamental right would transform marriage and its "high and holy purposes" into a base arrangement for "convenience and sensuality." *See* Evan Wolfson, *Why Marriage Matters: America, Equality and Gay People's Right to Marry* 64 (Simon & Schuster 2004).

All of these people were wrong then, of course, and those who argue that Proposition 8 is necessary to "protect" traditional marriage are just as wrong now. Marriage will endure, just as it has endured in the past when the "traditional" view of marriage had to give way to protect minorities from the oppression wrought by misguided, often unthinking, "consensus." Marriage is not about a man and a woman, just as it was not about a *white* man and woman *of color*, or a *white* woman and a *Chinese* man. Indeed, making the promises in the California Constitution come true by allowing *all* Californians to enjoy this fundamental right can only *strengthen* the institution of marriage.

In any event, "[t]radition alone" cannot validate the abrogation of a "fundamental constitutional right" such as the right to marry. *In re Marriage Cases*, 43 Cal. 4th at 820-21. In finding Proposition 22's statutory prohibition of same-sex marriage unconstitutional, the Court expressly recognized the dangers of substituting assumptions about the status quo for reasoned constitutional scrutiny. "[I]f we have learned

anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women over the past half-century," the Court wrote, it is that

> even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.

Id. at 853-54; *see also id.* at 860 (Kennard, J., concurring) ("The architects of our federal and state Constitutions understood that widespread and deeply rooted prejudices may lead majoritarian institutions to deny fundamental freedoms to unpopular minority groups, and that *the most effective remedy for this form of oppression is an independent judiciary* charged with the solemn responsibility to interpret and enforce the constitutional provisions guaranteeing fundamental freedoms and equal protection." (emphasis added)).

V. RESTRICTING THE CIVIL DEFINITION OF MARRIAGE TO THE RELIGIOUS ONE HARMS SAME-SEX COUPLES.

Proposition 8 imposes significant restraints on the privacy and liberty interests of same-sex couples. As this Court recognized in *In re Marriage Cases*, relegating same-sex couples to a separate "marriage-like" institution intrudes on their right "to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples," by virtue of the lingering "intangible symbolic

differences" that are not erased by seemingly similar options. 43 Cal. 4th at 844-46. This Court already has rejected a variant of the purported interest in families and children that the Official Proponents recycle to justify Proposition 8. *Id.* at 825-28 (finding no merit in arguments in favor of the same-sex marriage ban based on a supposed state interest in fostering "responsible procreation" and purportedly more stable family environments). Proposition 8 thus constitutes "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Romer v. Evans* (1996) 517 U.S. 620, 635.

Furthermore, retaining the distinction between "domestic partnership" and "marriage" risks making the domestic partnership alternative "a mark of second-class citizenship." *In re Marriage Cases*, 43 Cal. 4th at 846. After all, as this Court noted, while the public understands what "marriage" means, not everyone may understand what "domestic partnership" entails. *Id.* Indeed, it is hard to determine what difference remains to be preserved in Proposition 8 unless it is protecting the religious definition or, as the LDS Amicus Brief phrased it, the "high social status" that comes from supposed social consensus and affiliation with certain religions.

Moreover, even religious and cultural views of marriage differ greatly. The reasons people marry are just as varied. Some do it for love,

some for money, some for duty. Some are in it until death, and others stick it out only until disagreement. These are not the State's concerns.

Proponents of Proposition 8 cannot credibly maintain that they have spent tens of millions of dollars protecting only a word. Either the word "marriage" is meaningless, or it conveys some sort of right. Either it is a harmless idea, or it is a status which is being withheld from a constitutionally suspect class of citizens for no cognizable state interest.

What purpose could the disparity in terms possibly serve, except to elevate one relationship to the "high social status" enjoyed by religious marriage and degrade the other? By insisting on the distinction, Proposition 8's proponents ensure that it is pernicious. *See In re Marriage Cases*, 43 Cal. 4th at 847 ("[T]he existence of two separate family designations – one available only to opposite-sex couples and the other to same-sex couples – impinges upon this privacy interest, and may expose gay individuals to detrimental treatment by those who continue to harbor prejudices that have been rejected by California society at large.").

VI. BY CONTRAST, ALLOWING SAME-SEX COUPLES TO MARRY HARMS NO ONE.

Allowing same-sex couples to marry "does not diminish any other person's constitutional rights," including the right to choose to marry an individual of the opposite sex, nor limit anyone's religious freedom. *In re Marriage Cases*, 43 Cal. 4th at 825. As Thomas Jefferson long ago

observed: "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg." Thomas Jefferson, *Notes on the State of Virginia* 165 (Frank Shuffelton ed., Penguin Classics 1999) (footnote omitted).

A ruling that the same-sex marriage ban is unconstitutional is the only way the State can remain neutral in the fierce religiously-fueled debate over same-sex marriage, because a civil marriage by definition is not a religious marriage and vice versa. These private religious beliefs, even if they rise to the level of ecclesiastical law, are not and cannot be enforced by the State. For example, Catholicism prohibits divorce, but California allows it. Orthodox Judaism and several other religions forbid inter-faith marriages, but these unions are not accorded a separate status under the California Constitution. Some religions forbid premarital sex, but California does not outlaw it. In Islam, the prohibition on incest extends to foster siblings, but California does not stop non-blood relatives from marrying. If a Catholic priest marries, he has violated the laws of his faith, but his civil marriage will be just as valid in California as any other in the eyes of the civil law.

These religious restrictions and prohibitions are matters of conscience. The fact that they are not codified in the laws of the State does not prevent followers of these faiths from holding these beliefs deeply, and

adhering to these rules strictly in their personal lives. Under Proposition 8, the State steps in to enforce "Biblical Truth" *only* if the divorcé, follower of a different faith, foster sibling, etc. happens to be of the same gender as the would-be spouse. Thus, if a Unitarian Universalist wishes to marry a person of the same sex – as permitted by his church and consistent with his faith – Proposition 8 makes that marriage unlawful as a matter of California state law. If the religious definition of marriage became part of civil law – the California Constitution no less –the State would be advancing not only a viewpoint that is understood as inherently religious, but also one on which different religions disagree.

Seen in this light, the Official Proponents' arguments make Petitioners' points. For example, the literature posted online for voters to review on the Proposition 8 ballot measure asserts that Proposition 8 does not take away any rights or prevent same-sex couples from living the "lifestyle" they "choose," but then goes on to say that, "while gays have the right to their private lives, *they do not have the right to redefine marriage for everyone else*." *See* http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm. Ironically (and tellingly), it is these very proponents who say *they* have the right to redefine marriage for everyone else (that is, the 48% of California voters and their families who opposed Proposition 8), so long as the "else" is people unlike them – namely LGBT persons who want to be married under civil law.

Expanding the definition of marriage to more accurately reflect the long-term, committed and loving relationships that thousands of Californians have entered into, on the other hand, does not redefine the relationships of those who are already in long-term, committed, heterosexual relationships. Heterosexuals do not have to change anything about how or whom they marry or what they personally believe.

An argument in favor of Proposition 8 posted in California's voter guide likewise asserts that teaching children about whether or not "gay marriage is okay" is an issue for parents to discuss with their children privately, "according to their own values and beliefs," and not something that should be forced on people against their will. http://www.voterguide.sos.ca.gov/argu-rebut/argu-rebutt8.htm; *see also id.*, rebuttal (claiming that the decision forces "conflicting messages" on young children). By refusing to recognize same-sex marriage, Proposition 8 harnesses the power of the State to send the signal that same-sex marriage is "not okay," instead of simply leaving it as a matter of individual choice and private conscience, as is the case with divorce.

Similarly, if a child of a "traditional" couple learns at school that "gay marriage is okay," his parents can explain that, while the state allows same-sex couples to marry, they do not personally agree as a matter of their private religious belief, and point out that the state draws the line at civil marriage. If a child of a domestic partnership learns at school that marriage

is only between a man and a woman, however, his parents have the far more difficult task of explaining why they believe that they are married just like anyone else, when the State officially says that they are not, and cannot be married.

In their frenzy to protect their children from the imagined harm of learning about other sexual orientations, non-majoritarian religious beliefs, and the fact that same-sex couples can love each other just as deeply as heterosexual ones, Official Proponents ask this Court to condone the much deeper and real harm – and one of constitutional dimensions – that this Court identified in Proposition 22 and refused to inflict on LGBT families. It should refuse to do so again here.

CONCLUSION

In *In re Marriage Cases*, this Court emphasized that, in *Perez*, it had found the statutes banning interracial marriages unconstitutional even though they had been on the books "since the founding of the state." 43 Cal. 4th at 781. The Court went on to observe that the 1948 *Perez* decision, "although rendered by a deeply divided court," is an opinion "whose legitimacy and constitutional soundness are by now universally recognized." *Id.*

For the reasons advanced in this brief, and in those of the Petitioners, FIA has no doubt that history will render the same verdict on *In re Marriage Cases* and on a decision here finding Proposition 8

unconstitutional. FIA is just as confident that in the future (hopefully in less than the two decades that elapsed between *Perez* and *Loving*) other courts will follow this Court's lead. To our knowledge, *no* court in the United States has *ever* overruled, limited, or abandoned a constitutional decision that expanded the protection of minorities from the oppression at the hands of a majority, whether the minority was people of color, women, Jews, Asians, or anyone else.

The late Reverend Martin Luther King, Jr. often exhorted his audiences to remember that "the arc of the moral universe is long, but it bends towards justice." FIA respectfully submits that a decision finding Proposition 8 unconstitutional will shorten that course, and bend that arc towards justice, for LGBT people, not only in this State, but in this country.

Dated: January 14, 2009

Respectfully submitted,

DICKSTEIN SHAPIRO LLP

By: 

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[6] Counsel is indebted to Howard A. Vine, Woody N. Peterson, Bethany B. Dukes, and Cathy Chen, her colleagues in the District of Columbia office of her Firm, for their significant contributions to this brief.

RULE 8.204(c)(1) CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of court, I hereby certify that the textual portion of the foregoing Amicus Curiae Brief has been prepared using proportionately spaced Times New Roman 13 point typeface, and contains 7,134 words, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate of Compliance, as calculated using the word count feature in Microsoft Word.

Dated: January 14, 2009

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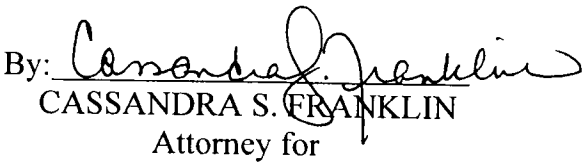
By: 
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PROOF OF SERVICE

Case Nos. 168047, S168066, S168078
Strauss v. Horton, Tyler v. State of California, City & County of San Francisco v. Horton

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party to the above-entitled actions. I am employed in the County of Los Angeles, and my business address is, 2049 Century Park East, Suite 700, Los Angeles, CA 90067-3109.

On January 14, 2009, I served the attached document described as follows:

APPLICATION OF FAITH IN AMERICA, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF FAITH IN AMERICA, INC. IN SUPPORT OF PETITIONERS

on the parties in this matter at the addresses below as follows:

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